Soon Kong Meng & Anor v Lee Thye & Ors

FEDERAL COURT (KUALA LUMPUR) — CIVIL APPEAL NO 02-489 OF 1990
ANUAR CJ (MALAYA), PEH SWEE CHIN AND WAN ADNAN FCJJ
18 APRIL 1995

Civil Procedure *— Specific performance — Application for — Whether affidavit in support of application must contain statement that there is no defence to action — Whether failure to do so fatal — Whether specific words necessary — Rules of the High Court 1980 O 81 r 2(1)*

Civil Procedure *— Affidavits — In support of application for specific performance — Whether must contain statement that there is no defence to action — Whether specific words necessary — Rules of the High Court 1980 O 81 r 2(1)*

Statutory Interpretation *— Construction of statutes — Purposive approach — Interpretation of words should accord with intention of legislature*

This is an appeal on an order made on an application for specific performance of a sale and purchase agreement for a piece of land. The application was filed under O 81 of the Rules of the High Court 1980 ('the Rules'). The appellant contends that the respondents in their supporting affidavit in the application under O 81, had failed to depose their belief that there was no defence to the action as was required in O 81 r 2(1) of the Rules. This is because there was not even one sentence using the very words of the O 81 r 2(1) in any of the affidavits filed by the respondents in their application for specific performance. However, in an affidavit given by a person who could positively swear to the facts verifying the cause of action, this statement was given: 'I wish to state here that the first and second defendants are making a deliberate attempt to deceive the plaintiffs and the honourable court affirming a false affidavit' ('the quoted words'). One of the issues in the appeal was whether or not the quoted words were of sufficient compliance with the said requirement.

Held, dismissing the appeal:

The words in a statute ought to be construed in a sense in which they best harmonize with the subject of the statute and in which the object of the statute is to be attained, even though sometimes the said sense is not strictly in accordance with the ordinary general meaning of the words used. The result from this is that any words in a statute, in order for them to accord with the intention of the legislature, could be extended or restricted realistically as the case may be, on their interpretation. Therefore, the words used in a statute or documents should be construed with the attainment of their object in mind. As such, the quoted words were of sufficient compliance and of apparent conformity with the requirement in O 81 r 2(1) of the Rules.

A **[Bahasa Malaysia summary**

Ini adalah rayuan atas suatu perintah yang dibuat atas permohonan untuk pelaksanaan spesifik perjanjian jual beli untuk sebidang tanah. Permohonan itu difail di bawah A 81 Kaedah-Kaedah Mahkamah Tinggi 1980 ('Kaedah itu'). Perayu mengatakan bahawa penentang di dalam afidavit sokongan mereka untuk permohonan di bawah A 81, telah gagal untuk mendepos kepercayaan mereka bahawa tiada pembelaan kepada tindakan itu seperti yang diperlukan oleh A 81 k 2(1) Kaedah itu. Ini adalah kerana tidak terdapat satu ayat pun yang menggunakan perkataan yang terkandung di dalam A 81 k 2(1) Kaedah itu di dalam mana-mana afidavit sokongan yang difailkan oleh penentang untuk permohonan pelaksanaan spesifik. Walau bagaimanapun, di dalam afidavit yang diberi oleh seorang yang boleh secara positif bersumpah ke atas fakta yang mengesahkan kausa tindakan, pernyataan ini diberi: 'Saya ingin mengatakan di sini bahawa defendan pertama dan kedua telah mencuba dengan sengaja untuk memperdayakan pihak plaintif dan mahkamah yang mulia ini dengan mengesahkan afidavit yang palsu' ('perkataan yang dipetik'). Salah satu daripada isu dalam rayuan ini adalah sama ada perkataan yang dipetik itu mematuhi secukupnya keperluan tersebut.

Diputuskan, menolak rayuan itu:

Perkataan di dalam statut harus ditafsirkan dalam erti kata di mana ianya akan diharmunikan dengan cara yang paling baik dengan isi perkara statut itu dan dengan mana objek statut itu akan tercapai, walaupun kadangkala erti kata tersebut tidak mengikut makna am biasa perkataan yang digunakan itu. Keputusannya ialah mana-mana perkataan yang digunakan dalam sesuatu statut supaya dapat diberikan makna mengikut tujuan badan perundangan, boleh diperluaskan atau dibataskan secara realistik mengikut kes, di atas tafsiran mereka. Maka, perkataan yang digunakan di dalam suatu statut atau dokumen mesti ditafsirkan dengan memikirkan pencapaian objek mereka. Oleh yang demikian, perkataan yang dipetik itu mematuhi secukupnya dan nampaknya menurut keperluan di dalam A 81 k 2(1) Kaedah itu.]

Notes

For cases on specific performance, see 2 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 3074–3115.

For cases on affidavits, see 2 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 176–204.

Cases referred to

Esso Petroleum Malaysia Inc v Kago Petroleum Sdn Bhd [1995] 1 MLJ 149 (refd)

G (an infant), Re [1963] 2 QB 73 (refd)

Hale, In the Goods of [1915] 2 IR 362 (refd)

IE Contractors Ltd v Lloyds Bank Plc and Rafidain Bank [1990] 2 Lloyd's Rep 496 (refd)
Sunkyong International v Malaysia Rubber Development [1992] 2 MLJ 146 (refd)
Tan Tik Seng v Gomez Development Co Sdn Bhd [1979] 2 MLJ 78 (refd)
Wiltshire v Barrett [1966] 1 QB 312; [1965] 2 All ER 271; [1965] 2 WLR 1195 (refd)

Legislation referred to

Rules of the High Court 1980 O 11 r 4(1), O 81 r 2(1)
Rules of the Supreme Court 1980 O 14A
Adoption Act 1958 s 7(2) [GB]
Road Traffic Act 1960 s 6(4) [GB]
Wills Act 1837 s 11 [GB]

Appeal from: Civil Suit No 22–14–1990 (High Court, Temerloh)

Manjit Singh (*Sri Ram & Co*) for the appellants.
Mura Raju (*Zulkifli bin Othman* with him) (*Zul & Co*) for the respondents.

Peh Swee Chin FCJ (delivering the grounds of judgment of the court): We have earlier dismissed the appeal with costs here and below with an order for the deposit in question to be paid out to the respondents to account of taxed costs.

The order appealed from was made on an application for specific performance of a sale and purchase agreement of the land in question, the application having been filed apparently under O 81 of the Rules of the High Court 1980. Several points were canvassed before us and we found no merits in them. We, consequently, declined to interfere with the order of the learned judge below, and notwithstanding this, we felt we should give our grounds for deciding on one of the points thus raised.

The point was that the plaintiffs in their supporting affidavit in respect of the said application under the said O 81, had failed to depose, that in their belief there was no defence to the action ('the said requirement') as stated in O 81 r 2(1) which is set out below:

> An application under rule 1 must be made by summons supported by an affidavit made by some person who can swear positively to the facts verifying the cause of action and stating that in his belief there is no defence to the action.

Reliance was placed on the case of *Tan Tik Seng v Gomez Development Co Sdn Bhd* [1979] 2 MLJ 78, in which it was held that in an application under O 14A of the then Rules of the Supreme Court 1980 (since repealed), the plaintiff must state that in his belief there was no defence to the action, and the learned judge held that the application for summary judgment under O 14A must be dismissed *in limine*.

A The old O 14A referred to summary judgment for specific performance of sale or purchase of land, etc, and stated the requirement, inter alia, that a deponent of a supporting affidavit should contain the deposition that, in his belief there was no defence, likewise in our present O 81 r 2(1) set out above.

B It is true that there was not a sentence in any of the affidavits filed by the present plaintiffs in their application for specific performance, using the very words of the O 81 r 2(1) as set out above, ie that in their belief, there was no defence to the action. But the affidavit by the person, who could swear positively to the facts verifying the cause of action, after dealing with the defendants' bare allegation that the sale and purchase C agreement was a sham for an illegal money-lending transaction; stated in para 10 at p 57 of the appeal record: 'I wish to state here that the first and second defendants are making a deliberate attempt to deceive the plaintiffs and the honourable court affirming a false affidavit' ('the quoted words').

The only important issue in the instant appeal was, therefore, whether D or not the quoted words were a sufficient compliance with the said requirement. It goes without saying, it would have saved a great deal of time for everybody if the said words of the said requirements were just used, and they were not.

In an analogous case, O 11 r 4(1) of the Rules of the High Court E 1980 came up for consideration before the Supreme Court in *Sunkyong International v Malaysia Rubber Development* [1992] 2 MLJ 146. Order 11 r 4(1) provides, in connection with the service of a notice of a writ out of jurisdiction, that an application must be supported by an affidavit stating, inter alia, 'that in the deponent's belief, the plaintiff has a good cause of action ...'. The Supreme Court held that this omission to mention a good F cause of action could not amount to anything more than a mere failure to comply with a rule of the High Court. The inference is obvious, that the mere failure to state the words in the inverted commas was not fatal neither was it an illegality. The Supreme Court was dealing principally with some other point which was the main question in that appeal.

G In *Esso Petroleum Malaysia Inc v Kago Petroleum Sdn Bhd* [1995] 1 MLJ 149, in connection with the wording of a demand or call on an on-demand unconditional performance bond or guarantee, this court agreed with the decision of England's Court of Appeal in *IE Contractors Ltd v Lloyds Bank Plc and Rafidain Bank* [1990] 2 Lloyd's Rep 496, in declining to adopt the strict requirement of the words stated in the said performance H bond. The Supreme Court stated, 'If words are in apparent conformity with the wording ... they are sufficient'.

In our view, words in a statute ought to be construed in a sense in which they best harmonize with the subject of the statute and in which also, the object of the statute is to be attained, even though sometimes the I said sense is not strictly in accordance with the ordinary general meaning of the words used. The result from this is that any words in a statute, in order for them to accord with the intention of the legislature, could be extended or restricted realistically as the case may be, on their interpretation.

The two points raised respectively in the two Supreme Court cases cited above were decided not strictly in accordance with the general ordinary meaning of the words used in statute or documents, but construed with the attainment of their object in mind.

Thus, words in a statute received an extended meaning for the same reason in *Re G (an infant)* [1963] 2 QB 73, when the following words in s 7(2) of Britain's Adoption Act 1958 came in question: 'In determining whether an adoption order, if made, is for the welfare of the infant, the court ... should give consideration to the wishes of the infant, having regard to his age and understanding.' There, the judge's consideration of the reports of an infant's guardian ad litem was held to be a sufficient compliance with this section and he need not actually see the infant.

Again, s 6(4) of Britain's Road Traffic Act 1960 requires a constable to arrest without warrant 'a person committing' the offence of driving while unfit through drink. The Court of Appeal, then presided over by Lord Denning in *Wiltshire v Barrett* [1966] 1 QB 312; [1965] 2 All ER 271; [1965] 2 WLR 1195, held that a constable was justified in arresting a man who was 'apparently' committing the offence.

Again in *In the Goods of Hale* [1915] 2 IR 362, s 11 of Britain's Wills Act 1837 contained the words 'mariner or seaman being at sea', it was held that a woman typist employed on an ocean-going liner came within the said words.

Having regard to what has been stated above, we were of the view that the quoted words above, coupled with the denial or demonstrable implausibility of the allegations of the defendants, were a sufficient compliance with the said requirement, ie the words being in apparent conformity with the words of the said requirement.

For the reasons stated, we dismissed the appeal.

Appeal dismissed.

Reported by Prof Ahmad Ibrahim